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From: Mr Johan DENOLF, Chairman of the OLAF Supervisory Committee
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To: Mr Christos STAIKOURAS, President of the Council of the European Union

Subject: Activity Report of the OLAF Supervisory Committee: February 2013 -
January 2014
- ANNEX 3: Opinion No 1/2014: OLAF Investigation Policy Priorities

Delegations will find attached ANNEX 3 to the Activity Report of the OLAF Supervisory Committee for the period February 2013 - January 2014..

Encl.: ANNEX 3: Opinion No 1/2014: OLAF Investigation Policy Priorities



Opinion No 1/2014

OLAF Investigation Policy Priorities

The Supervisory Committee of the European Anti-Fraud Office (OLAF) examined the Investigation Policy Priorities (IPPs) established, on a yearly basis, by the Director-General of OLAF. The Committee compared the IPPs for 2012 and 2013 with the draft IPPs for 2014. The Committee welcomed the improved definition of the IPPs for 2014. The Committee considered however that the policy on financial indicators and the implementation of the proportionality principle needs further clarification. The Committee also drew attention to the need to reconsider the subsidiarity/added value policy and to apply it with caution, as well as to the need of a regular assessment of the IPPs.



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Introduction

1. The Investigation Policy Priorities (IPPs) were established by the European Anti-Fraud Office (OLAF) for the first time within the framework of the Management Plan 2012 as an element of the reorganisation of the Office, aiming at improving the selection procedure. *"The IPPs [were] used by OLAF to decide on the opening of investigations. These priorities [came] into play after the competence of OLAF and the necessary level of suspicions [had] been established".¹*
2. On 1 October 2013, Regulation (EU, Euratom) No 883/2013² entered into force. It obliges the Director-General of OLAF (OLAF DG) to determine the IPPs each year and also to forward them, prior to their publication, to the Supervisory Committee (SC) of OLAF³. In the light of its role of reinforcing OLAF's independence and of its duties to assist the OLAF DG in discharging his responsibilities⁴, the SC decided to thoroughly examine the IPPs for 2012, 2013 and 2014.

I. The IPPs established by the Director-General

I.1 IPPs for 2012

3. There were five IPPs established in 2012:
 - (i) *proportionality*,
 - (ii) *efficient use of investigative resources*,
 - (iii) *subsidiarity/added value*,
 - (iv) *special policy objectives*,
 - (v) *financial impact*.

¹ OLAF Management Plan 2012, p.20.

² Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, OJ L 248, 18.9.2013, p. 1.

³ Article 17(5) of Regulation (EU, Euratom) No 883/2013.

⁴ Article 15 and recital 37 of Regulation (EU, Euratom) No 883/2013.



4. The special policy objectives were related to sectors and geographical areas decided by the OLAF DG on the basis of concerns and priorities expressed by the European Institutions and of OLAF's own risk analyses. For 2012 the special policy objectives included:
- a) *double funding in external aid,*
 - b) *smuggling of cigarettes and alcohol along the EU eastern border,*
 - c) *cohesion funds,*
 - d) *pre-accession funds in current accession and candidate countries,*
 - e) *suspected corruption or links to organised crime.*⁵
5. The priority related to the financial impact included financial indicators, e.g. €500 000 in the European Social Fund and Cohesion Fund and €1 million in the European Regional Development Fund (estimated misappropriation or wrongful retention of funds), over €1 million (estimated illegal diminution of resources) in the customs sector.⁶

1.2 IPPs for 2013

6. The IPPs have been updated for 2013 and they include four criteria:
- (i) *proportionality,*
 - (ii) *efficient use of investigative resources,*
 - (iii) *subsidiarity/added value,*
 - (iv) *special criteria for 2013.*
7. The special criteria for 2013 are related to sectors only and no longer to geographical areas. The adoption of those criteria is linked to documents issued by stakeholders.⁷ There are three prioritised sectors:
- a) *smuggling of cigarettes and alcohol into the EU,*

⁵ OLAF Management Plan 2012, p. 21.

⁶ *Ib.*, p. 22.

⁷ OLAF Management Plan 2013, footnotes 32, 33 and 34 on p. 44.



- b) *the EU and national public procurement in the field of regional policies,*
- c) *rural development.*⁸

Finally, the special criteria include also financial indicators which are equivalent, in content, to the *financial impact* priority of 2012.⁹

I.3 Regulation No 883/2013

- 8. Regulation No 883/2013 establishes certain principles to be taken into account by the OLAF DG, alongside the IPPs, when deciding whether or not to open an investigation¹⁰.
- 9. Those general principles include:
 - (i) *proportionality of the means employed,*
 - (ii) *efficient use of resources,*
 - (iii) *added value of an OLAF internal investigation,* taking into account the nature of an illegal activity and its financial impact.

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I.4 Draft IPPs for 2014

- 10. On 4 December 2013 the OLAF DG transmitted to the SC the draft IPPs for 2014 which are to be adopted by the end of January 2014. The draft priorities for investigation in 2014 include:
 - (i) *smuggling of cigarettes and tobacco into the EU, in particular via maritime transport and along the EU Eastern border;*
 - (ii) *abuse of origin rules and tariff classification in both preferential and non-preferential trade regimes in order to evade payment of conventional customs duty and anti-dumping duties;*

⁸ *Ib.*, p. 44.

⁹ *Ib.*, p. 45.

¹⁰ Article 5(1).



(iii) *cases with indications of fraud and/or corruption in relation to public procurement for infrastructure networks;*

(iv) *cases of fraud concerning specific projects (co)financed by the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and Pre-accession Funds and in which action by the Member States or Candidate Countries is deemed to be insufficient.*

11. The draft priorities are related to the areas of activities of OLAF Directorate B only (not Directorate A). They are based on 9 key documents issued by stakeholders and they do not contain any reference to financial indicators.

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1.5 Feedback from other Directorates-General of the European Commission

12. On 11 February 2013 the responsible unit in the Directorate-General for Agriculture and Rural Development (DG AGRI) formally alerted OLAF via a registered note¹¹ that the financial indicator for one of the priorities – rural development – adopted by the OLAF DG, apparently without having consulted DG AGRI and defined as over 250 000 EUR, would exclude 99,83% of cases, since only 1036 beneficiaries, out of 563 196, received subsidies above that threshold. DG AGRI expressed the view that it might be worthwhile considering a revision of the threshold of 250 000 EUR, in order to increase the impact of OLAF's activities in the rural development sector. In May 2013 the Director-General of DG AGRI complained¹² to the OLAF DG that the above mentioned note of 11 February 2013 had never been answered. OLAF DG replied in July 2013, "taking note" of the proposed "adaptation of the financial thresholds", stressing that they are just one of the indicators and that when cases are dismissed on the basis of the IPPs, the relevant information is "systematically" transferred to the competent authorities.¹³

¹¹ Note Ares(2013)175305 addressed to the Head of Unit 0.1.

¹² Note Ares(2013)1118690.

¹³ Note Ares(2013)2587818.



13. With regard to a number of cases dismissed by OLAF and transferred to DG AGRI for appropriate action, DG AGRI continued to express its disagreement. In particular, DG AGRI pointed out that its competence lies in carrying out system audits; it therefore cannot undertake verifications regarding individual cases (e.g. possibly irregular payments to individual beneficiaries) that would amount to investigative activities for which it is not competent. As a consequence, DG AGRI decided not to follow-up such cases forwarded by OLAF.¹⁴ In reply, DG AGRI was referred to OLAF's "Guidance note for treatment of dismissed cases"¹⁵ listing actions that can be taken in such circumstances.

14. The SC's inquiries have shown that the problem of insufficient consultation with the stakeholders concerns also other "spending" DGs. In particular the issue of criteria for establishing financial indicators and the issue of the follow-up of cases of fraud or irregularity which are dismissed by OLAF seem to be addressed unilaterally by OLAF, without taking effectively into account opinions of the stakeholders.

II. Supervisory Committee's assessment of the IPPs

II.1 *Improved definition of the IPPs*

15. The **IPPs for 2012 and 2013** contained, as priority criteria to be taken into consideration by OLAF to decide on the opening of investigations, three general principles, namely proportionality, need for efficient use of investigative resources and subsidiarity. The SC has pointed out in technical meetings with OLAF that *proportionality* and *subsidiarity* belong to the general principles of the EU law and as

¹⁴ E.g. note Ares(2013)3660752 of December 2013.

¹⁵ Ares(2013)622043 of April 2013.



such must be always applied by all the EU bodies in accordance with the established EU case-law. As a result, those principles cannot constitute discretionary priorities of the Director-General of OLAF.

16. The SC notes that Regulation No 883/2013 has established a clear distinction between the three general *principles* which always need to be taken into account by the Director-General and the *priorities* which he himself is to determine each year within the context of the annual management plan¹⁶. The principles established in the Regulation correspond largely to the first three IPPs for 2012 and 2013. Therefore, since 1 October 2013, only the special annual criteria and the financial indicators determined by the Director-General can be considered as the IPPs for OLAF in the sense of the Regulation.

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17. **The SC welcomes the fact that, following its comments expressed during technical meetings, the Director-General included in the draft IPPs for 2014 only those elements which can be clearly considered under the Regulation as *priorities* (and not *principles*).**

18. Moreover, the SC would draw attention to the fact that the general *principles* established in the Regulation are binding on the Director-General for all his decisions on opening or not an investigation. Since these decisions are based on the opinions of the Investigation Selection and Review Unit, the SC believes that it is important to provide the responsible staff in that unit with guidelines on the application of those principles.

II.2 Need to clarify the policy on financial indicators

19. The **IPPs for 2012 and 2013** listed a certain number of financial indicators to be taken into account in the selection process, together with other priority criteria. Already in

¹⁶ See Article 5.



its 2012 Annual Activity Report, the SC indicated that some of the thresholds were excessively high. At that time, the SC expressed its concern that potential fraud or irregularities likely to have a lower, but still significant financial impact, may not be taken into consideration, despite clear evidence¹⁷. In particular, the SC highlighted that *"The setting by the Director-General of high financial thresholds, to be taken into consideration by OLAF prior to open an investigation in various sectors and the possibility for the Director-General not to open an investigation even if there is "sufficient suspicion", without a parallel duty for the Director-General to inform the competent authorities of institutions when he decides not to open an investigation, risks resulting in areas of impunity"*¹⁸.

20. Another concern that the SC wishes to express relates to the fact that those financial indicators were established apparently without any consultation with the stakeholders. It would not be consistent with the European Commission's anti-fraud strategy, which promotes OLAF's proactive and reinforced role in assisting the Commission Services, by providing, *inter alia*, a methodology and guidance on the development and implementation of the sectoral anti-fraud strategies¹⁹. The SC would point out that the departments responsible for managing and/or supervising EU funds should receive proper information concerning suspicions of fraud or irregularities detrimental to the EU financial interests. In the absence of such information, they cannot ensure adequate protection of the EU's financial interests. In addition, the SC considers that OLAF would benefit from a constructive dialogue with its stakeholders with regard to financial indicators, since they are primarily responsible for managing EU funds and, as such, hold the most reliable information on elements of expenditure potentially

¹⁷ See the SC's 2012 Annual Activity Report, p. 23.

¹⁸ *Ib.*, p. 42.

¹⁹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions and the Court of Auditors, on the Commission anti-fraud strategy, 24.6.2011, COM(2011) 376 final.



affected by fraud, irregularities or other illegal activities detrimental to the EU financial interests.

21. **The SC welcomes the fact that, following its comments expressed in its Activity Report for 2012, the Director-General decided to review the policy on financial indicators. The SC is, however, concerned that, as the result, the DG has completely excluded any financial indicators from the draft IPPs for 2014, leaving the unit responsible for case selection without any concrete guidance in this respect.**

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22. The SC would point out that, despite the financial indicators for 2012 and 2013 being arbitrary and dangerously overstated, it considers that some financial impact criteria - discussed with the stakeholders – are, however, relevant for the assessment of the seriousness of the risk involved and could be useful as an element of reference and as internal guidelines on the application of the proportionality principle. The financial criteria should take into account the input from the European Commission's Directorates-General and from the EU institutions or bodies involved in the financial lifecycle and which are the best placed for holding timely information on the management of EU funds and on potential risks of fraud or irregularities detrimental to the EU financial interests.

II.3 Need to reconsider the subsidiarity/added value policy

23. The SC notes that the subsidiarity principle, combined with the assessment of the added value of OLAF's action, was one of the IPPs for 2012 and 2013. In Regulation No 883/2013 the *added value* appears as a stand-alone principle concerning internal investigations²⁰, while the principle of *subsidiarity* is referred to

²⁰ Article 5(1).



(in the meaning of Article 5 of the Treaty on European Union) in the context of external investigations²¹. However, they continue to be applied by the Investigation Selection and Review Unit as one selection criterion, regardless of the type of case²². Since the two principles have been reinforced by the Regulation and defined in two different contexts, the SC considers that OLAF should clarify their application in the selection process.

24. The SC also notes, from the feedback received from other Directorates-General of the Commission, as well as from its own analysis of opinions of the Investigation Selection and Review Unit, that the application of this principle by OLAF is a matter of concern and that the likelihood of a follow-up by another authority seems to be insufficiently taken into consideration. While reiterating its views with regard to OLAF's "de minimis" policy, in particular the opinion that, in cases where minor wrongdoings/low impact cases can be dealt with satisfactorily by other services, OLAF may forward incoming information to other Commission services, rather than decide to open an OLAF investigation²³, the SC would point out that OLAF should be careful to verify whether or not the recipient authority has the necessary competence and powers to deal with the case, in order to be sure that appropriate follow-up is given to cases dismissed by another authority.

II.4 Need to regularly assess the IPPs

25. The SC notes that the IPPs, which are determined within the context of OLAF's Annual Management Plan, change every year and there are significant differences between the IPPs for 2012, 2013 and 2014. In the SC's opinion, such changes should be justified by concrete needs and measurable indicators. However, the SC is not

²¹ Recital (49).

²² The work-form "Opinion on opening decision" (version amended and adopted as of 1 October 2013) lists the subsidiarity/added value amongst the IPPs to be evaluated, without any distinction between internal and external cases.

²³ See the SC's Annual Activity Report, June 2008 – May 2009, point II – 1.2.



aware of any internal or external evaluation, feedback or follow-up of the IPPs for 2012 and 2013, and equally notes the absence of any action aimed at assessing the impact of the priorities prior to their adoption.

26. The SC believes that the IPPs should have as a purpose accomplishing certain objectives and therefore their implementation should be regularly assessed by OLAF, in order to establish whether or to what extent those objectives have been achieved. Moreover, the adoption of any new IPPs should be based on an impact assessment, which should include concrete and measurable indicators, lessons learnt from the implementation of previous IPPs and results of internal audits. The draft IPPs which shall be forwarded to the SC every year should be accompanied by the assessment of the implementation of former IPPs and the impact assessment of new IPPs, together with background documents.



III. Supervisory Committee's recommendations

27. In light of the above considerations, the Supervisory Committee:

- (1) recommends that the Director General issue guidelines on application of the three selection principles established by the Regulation, including on the application of financial indicators as a proportionality criterion;
- (2) recommends that the Director General enter into a constructive dialogue with the stakeholders on the determination and implementation of IPPs, in particular with regard to financial indicators and possible follow-up of dismissed cases;
- (3) requests the Director General to provide the SC, by 6 March 2014, with an assessment of the results of the implementation of the IPPs for 2012 and 2013 together with a summary of the feedback provided by the stakeholders; in the following years those documents should be attached to the new draft IPPs transmitted annually to the SC.

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Adopted in Brussels, on 6 February 2014

For the Supervisory Committee

Chairman